



SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-97255; File No. SR-MSRB-2023-01]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendment No. 1 to Proposed Rule Change Consisting of Amendments to MSRB Rule G-40, on Advertising by Municipal Advisors, and MSRB Rule G-8, on Books and Records

April 5, 2023.

I. Introduction

On January 31, 2023, the Municipal Securities Rulemaking Board (“MSRB”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)¹ and Rule 19b-4 thereunder,² a proposed rule (the “original proposed rule change”) consisting of amendments to MSRB Rule G-40 on advertising by municipal advisors (“Rule G-40”), and MSRB Rule G-8 on books and records (“Rule G-8”).³

The original proposed rule change was published for comment in the Federal Register on February 14, 2023.⁴ The Commission received two comment letters on the original proposed rule change.⁵ On March 21, 2023, the MSRB granted an extension of time for the Commission to act on the filing until May 15, 2023.⁶

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See MSRB filing of original proposed rule change, available at <https://msrb.org/sites/default/files/2023-01/MSRB-2023-01.pdf>.

⁴ Release No. 34-96840 (Feb. 8, 2023), 88 FR 9580 (Feb. 14, 2023) (“Notice”). The comment period closed on March 7, 2023.

⁵ See Letter to Secretary, Commission, from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated March 7, 2023 (“SIFMA Letter”); Letter to Secretary, Commission, from Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated March 7, 2023 (“NAMA Letter”).

⁶ See “Extension of Time on File No. SR-MSRB-2023-01 to May 15, 2023,” available at <https://msrb.org/sites/default/files/2023-03/MSRB-2023-01%20eot.pdf>.

On April 4, 2023, the MSRB responded to the comments⁷ and filed Amendment No. 1 to the original proposed rule change (“Amendment No. 1”). The text of Amendment No. 1 is available on the MSRB’s website.⁸ The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons.

II. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Amendment

As described further below, the MSRB filed Amendment No. 1 to respond to comments on the original proposed rule change, relating to: (1) the definition of “testimonial;” (2) non-client testimonials; (3) solicitor municipal advisors; (4) social media guidance; and (5) other clarifications to rule text and design.⁹

A. Definition of Testimonial

The MSRB noted that a commenter suggested that the term “testimonial” be defined within the rule language itself.¹⁰ The MSRB responded, stating it would provide a definition of a “testimonial” in Rule G-40 to avoid confusion with the term “testimonial” as used in Rule 206-4(1)¹¹ under the Investment Advisers Act of 1940 (“Advisers Act”).¹² Specifically, the MSRB defined “testimonial” in amended Rule G-40(a)(iv)(G)(1) as “a statement of a person’s or entity’s experience concerning the municipal advisor or concerning the municipal advisory

⁷ See Letter from Saliha Olgun, Interim Chief Regulatory Officer, MSRB, to Secretary, Commission, dated April 4, 2023, available at <https://msrb.org/sites/default/files/2023-04/MSRB-2023-01%20Comment%20Letter.pdf>.

⁸ Amendment No. 1 is available at <https://msrb.org/sites/default/files/2023-04/MSRB-2023-01%20A-1.pdf>.

⁹ The MSRB stated that Amendment No. 1 does not alter or impact the analysis in the original proposed rule change’s burden on competition or the statutory basis sections. See Amendment No. 1.

¹⁰ NAMA Letter at 1-2; see also Amendment No. 1.

¹¹ 17 CFR 275.206(4)-1(b)(1).

¹² See Amendment No. 1; 15 U.S.C. 80b-1 – 80b-2.

services rendered by the municipal advisor.”¹³ Furthermore, the MSRB also removed language from the original proposed rule change referring to the “advice, analysis, report, or other services rendered by the municipal advisor.”¹⁴ The MSRB concluded that replacing this language with “municipal advisory services” in the definition of “testimonial” (and elsewhere in the original proposed rule change’s rule text) provided greater clarity.¹⁵ The MSRB also made conforming numbering changes to the original proposed rule change’s Rule G-40 revisions to accommodate the addition of the definition of “testimonial” to amended Rule G-40(a)(iv)(G)(1).¹⁶

The MSRB stated that the revised rule text in amended Rule G-40(a)(iv)(G)(2) provides that, if a municipal advisor’s advertisement meets certain conditions, then a municipal advisor may, directly or indirectly, publish, circulate or distribute an advertisement which refers, directly or indirectly, to a testimonial.¹⁷ The MSRB posited that this definition addresses a comment requesting that Rule G-40 include a definition of the term “testimonial,” but also a comment’s suggestion that the rule “include affirmative language that testimonials may be used if certain requirements are met.”¹⁸ The MSRB also deleted a redundant phrase later in this subsection; specifically, amended Rule G-40(a)(iv)(G)(2)(b)(iv)(“the paid testimonial must include”).¹⁹

B. Non-Client Testimonials

The MSRB noted that both commenters suggested that it would promote further harmonization with MSRB Rule G-21 (“Rule G-21”), on advertising by brokers, dealers, and

¹³ See Amendment No. 1.

¹⁴ See id.

¹⁵ See id.

¹⁶ The MSRB also added a cross-reference to the new definition of “testimonial” in the original proposed rule change’s Rule G-8. See id.

¹⁷ See id.

¹⁸ NAMA Letter at 4; see also id.

¹⁹ See Amendment No. 1.

municipal securities dealers, if municipal advisors were able to use testimonials by third parties.²⁰ The MSRB stated that it will amend the original proposed rule change to permit municipal advisors to use testimonials from a third party, whether a person or entity, subject to the conditions set forth in proposed Amendment No. 1.²¹ The MSRB reasoned that, for example, analogous to Rule 206-4(1)²² under the Advisers Act,²³ an advertisement of a municipal advisor that includes a testimonial would need to include a disclosure indicating whether the testimonial is from a current client or from someone who is not a current client.²⁴ The MSRB wrote that it agreed with the Commission's belief that this type of disclosure would provide important context for weighing the relevance of the testimonial.²⁵

C. Solicitor Municipal Advisors

The MSRB stated that both commenters found the proposal to establish a different standard for the use of testimonials by solicitor municipal advisors confusing.²⁶ In response, the MSRB revised the original proposed rule change to create uniformity in the criteria for the use of testimonials by all municipal advisors.²⁷ Specifically, the MSRB removed proposed language that would have permitted, subject to certain conditions, a solicitor municipal advisor to pay more than \$1000 in total value in cash or non-cash compensation during the preceding 12

²⁰ See id.; NAMA Letter and SIFMA Letter.

²¹ See Amendment No. 1.

²² 17 CFR 275.206(4)-1(b)(1).

²³ 15 U.S.C. 80b-1 – 80b-2.

²⁴ See Amendment No. 1.

²⁵ See id.; see also Release No. IA-5653 (Dec. 22, 2020) (File No. S7-21-19), 86 FR 13024 (Mar. 5, 2021) (“IA Marketing Rule Adopting Release”) at 13048.

²⁶ See NAMA Letter and SIFMA Letter; see also Amendment No.1.

²⁷ See Amendment No.1.

months for a testimonial.²⁸ Additionally, the MSRB eliminated the proposed language in the original proposed rule change in Rules G-40 and G-8 concerning additional records to be maintained by a solicitor municipal advisor related to such payments.²⁹ The MSRB concluded that these revisions in Amendment No.1 would prohibit any municipal advisor from providing any compensation to a person or entity, directly or indirectly, of more than \$1000 in total value in cash or non-cash compensation during the preceding 12 months.³⁰

D. Social Media Guidance

The MSRB wrote that both commenters suggested that the MSRB’s “FAQs regarding the Use of Social Media under MSRB Rule G-21, on Advertising by Brokers, Dealers or Municipal Securities Dealers, and MSRB Rule G-40, on Advertising by Municipal Advisors” (“social media guidance”)³¹ be updated to reflect the proposed amendments to Rule G-40.³²

The MSRB responded by proposing to amend its social media guidance to reflect the proposed amendments to Rule G-40 (inter alia, allowing the use of testimonials in municipal advisor advertisements, subject to certain conditions).³³ The MSRB explained that the current social media guidance notes that, by paying for or soliciting positive comments from a third party, (i) a municipal advisor would be deemed to be entangled with those comments, and (ii) the posting of those third-party comments on the municipal advisor’s social media page would be

²⁸ See id.

²⁹ See id.

³⁰ Correspondingly, the MSRB added the phrase “directly or indirectly” to the original proposed rule change’s Rule G-8. See id.

³¹ These frequently asked questions (“FAQs”) were filed with the Commission for immediate effectiveness. See Release No. 34-85222 (Feb. 28, 2019), 84 FR 8132 (Mar. 6, 2019) (File No. SR-MSRB-2019-04). These FAQs can be found on the MSRB’s website at <https://www.msrb.org/FAQs-regarding-Use-Social-Media-under-MSRB-Rule-G-21-Advertising-Brokers-Dealers-or-Municipal-0> (Aug. 23, 2019).

³² See NAMA Letter and SIFMA Letter; see also Amendment No. 1.

³³ See Amendment No. 1.

deemed to be an advertisement by the municipal advisor that contains a testimonial.³⁴ The MSRB stated that Amendment No.1's revisions to the social media guidance would make clear that the advertisement containing a testimonial would be permissible so long as the advertisement meets the requirements of Rule G-40 (including having the requisite disclosures).³⁵

In addition, the MSRB noted that the revised social media guidance would make clear that if a municipal advisor did not pay, directly or indirectly, for a testimonial, but liked, shared, or commented on a post from a third-party, the municipal advisor would be deemed to have adopted those comments and the posting of those third party comments on the municipal advisor's social media page would be deemed an advertisement that contains a testimonial.³⁶ The MSRB concluded that the advertisement containing a testimonial would be permissible so long as the advertisement meets the requirements of Rule G-40 (including having the requisite disclosures).³⁷ The MSRB also revised the social media guidance's footnotes with updated citations and conforming numbering changes.³⁸

³⁴ See id.

³⁵ See id.

³⁶ See id.

³⁷ See id.

³⁸ See id.

E. Other Modifications to Rule Text

As discussed further below, the MSRB also proposed other textual changes in Amendment No. 1 to provide additional clarity and facilitate compliance.³⁹

i. Language in Rule G-40 Regarding Use of a Testimonial

The MSRB stated that it revised the original proposed rule change to clarify that a municipal advisor may only use a testimonial if the person or entity providing the testimonial has the knowledge and experience to make a statement concerning their experience with the municipal advisor or with the municipal advisory services rendered by the municipal advisor.⁴⁰

ii. Supplementary Material .03 to Rule G-40

The MSRB added Supplementary Material .03 to Rule G-40 to the original proposed rule change, stating that this revision would clarify that, in order for a requisite disclosure in an advertisement to be clear and prominent (including that a testimonial is a paid testimonial), the disclosure must be at least as prominent in the advertisement as the testimonial.⁴¹ The MSRB also explained that this revision indicates that disclosures should appear close to the associated testimonial statement with the same prominence so that the statement and disclosures are read at the same time, rather than referring the reader to somewhere else in the advertisement to view the disclosures.⁴²

III. Date of Effectiveness of the Proposed Rule Change and Amendment No. 1

As stated in the original proposed rule change, the MSRB will publish a regulatory notice no later than one month following the Commission's approval date, which will include an

³⁹ See NAMA Letter at 4.

⁴⁰ See Amendment No. 1.

⁴¹ See Amendment No. 1.

⁴² See id.

implementation date that shall be no later than three months following the Commission approval date.⁴³

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the filing as amended by Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MSRB-2023-01 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

All submissions should refer to File Number SR-MSRB-2023-01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm. Copies of the filing also will be available for inspection and copying at the principal

⁴³ See Notice.

office of the MSRB. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2023-01 and should be submitted on or before [INSERT DATE 15 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, pursuant to delegated authority.⁴⁴

Sherry R. Haywood,

Assistant Secretary.

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⁴⁴ 17 CFR 200.30-3(a)(12).